

TITLE VII AND SECTION 1981:

*A Guide for Appointed Attorneys
in the Northern District of Illinois*

© Michael K. Fridkin
Cynthia A. Wilson
Chicago Lawyers' Committee
for Civil Rights Under Law
April 2001

Foreword

The Chicago Lawyers' Committee for Civil Rights Under Law, Inc. has prepared this manual for use by attorneys appointed by judges in the Northern District of Illinois to represent indigent clients in employment discrimination cases. The manual contains a summary of Title VII of the Civil Rights Act of 1964 and Section 1981 of the Civil Rights Act of 1866, as amended by the Civil Rights Act of 1991, including important Seventh Circuit cases decided through the year 2000.

The Chicago Lawyers' Committee has agreed to assist appointed counsel by producing this manual, conferring with appointed counsel as to strategy, reviewing pleadings, conducting seminars, and providing other assistance that appointed counsel may need. For assistance, appointed counsel may contact Michael Fridkin at the Chicago Lawyers' Committee for Civil Rights Under Law, 100 N. LaSalle, Suite 600, Chicago, IL 60602, (312) 630-9744, mfridkin@clccrul.org.

TABLE OF CONTENTS

	PAGES
I. TITLE VII OF CIVIL RIGHTS ACT OF 1964	1
A. Introduction	1
B. Covered Employers	1
C. Protective Classes	1
1. Race or Color	1
2. National Origin	1
3. Sex	2
4. Religion	2
D. Theories of Discrimination	3
1. Disparate Treatment	3
a. Direct Method	3
b. McDonnell Douglas Burden-Shifting Method	3
(1) Prima facie case	4
(2) Employer's burden of production	5
(3) Plaintiff's proof of pretext	5
(i) Comparative evidence	6
(ii) Statistics	6
(iii) Direct evidence	7
(4) Sufficiency of evidence	7
(5) Instructing the jury	8

c.	Mixed Motives	8
d.	After-Acquired Evidence	8
e.	Pattern or practice discrimination	9
2.	Disparate Impact	9
a.	Supreme Court Cases	9
b.	Examples	10
c.	Allocations of proof	10
(1)	Prima facie case	10
(2)	Business necessity	10
(3)	Alternative practice with lesser impact	10
d.	Selection Criteria	11
(1)	Scored tests	11
(2)	Nonscored objective criteria	11
(3)	Subjective criteria	12
3.	Harassment	12
a.	Sexual Harassment	12
(1)	Quid pro quo	12
(2)	Hostile environment	13
(3)	Employer liability	13
(i)	The Meritor decision	13
(ii)	Harassment by a co-worker	14

(iii)	Harassment by a supervisor	14
(iv)	Application of principles	15
(v)	Same sex harassment	15
b.	Racial or Ethnic Harassment	16
c.	Equal opportunity harassment	16
4.	Retaliation	16
a.	Retaliation for "Participation"	16
b.	Retaliation for "Opposition"	17
c.	New EEOC Guidelines	17
d.	Contemporaneous requirement	17
e.	Retaliatory hostile work environment	17
5.	Other Adverse Actions	18
II.	THE CIVIL RIGHTS ACT OF 1866, 42 U.S.C. § 1981	18
A.	Statutory Language	18
B.	Scope	18
C.	Differences from Title VII	19
III.	EEOC PROCEEDINGS	19
A.	Scope of theses materials	19
B.	Summary of Proceedings	20
1.	Title VII Prerequisite	20
2.	Time requirements for charge	20
3.	Investigation	21

4.	Determination	21
5.	Dismissal and Issuance of Right-to-Sue Letter	21
6.	State and local government employees	21
7.	Federal employees	22
IV.	COMPLAINT	22
A.	Proper Defendants for a Title VII Action	22
1.	Employers	22
2.	Labor organizations and employment agencies	22
3.	Supervisors	22
B.	Scope of the Title VII Suit	22
C.	Timeliness in a Title VII Suit	22
D.	Timeliness in a § 1981 Suit	23
E.	Right to a Jury Trial	23
V.	REMEDIES	23
A.	Equitable Remedies for Disparate Treatment	23
B.	Compensatory and Punitive Damages	24
C.	Front Pay and Lost Future Earnings	25
D.	Attorney's Fees	26
VI.	ARBITRATION	27
A.	The Gilmer Decision	27
B.	The Circuit City Decision	27
C.	Collective Bargaining Agreements	27

I. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

- A. Introduction:** Title VII, 42 U.S.C. §§ 2000e *et seq.*, prohibits discrimination in hiring, promotion, termination, compensation, and other terms and conditions of employment because of race, color, sex (including pregnancy), national origin, or religion.
- B. Covered Employers:** Title VII applies to federal, state, and local governments and to private employers, labor unions, and employment agencies. A covered employer must be a "person" (including a corporation, partnership, or any other legal entity) who has 15 or more employees for each working day for 20 or more calendar weeks in the current or preceding calendar year. 42 U.S.C. § 2000e(b). The following types of employers are exempted from Title VII's coverage: bona fide membership clubs, Indian tribes, and religious organizations (a partial exemption). *Id.*
- C. Protected Classes:** Title VII prohibits discrimination on account of
- 1. Race or Color:** This category includes blacks, whites, persons of Latino or Asian origin or descent, and indigenous Americans (Eskimos, Native Hawaiians, Native Americans). The prohibition on discrimination based on "color" also has been interpreted by some courts to mean that a light-skinned black worker could pursue a discrimination case based on the actions of her darker-skinned supervisor. *See, e.g., Walker v. Secretary of Treasury, IRS*, 742 F. Supp. 670 (N.D. Ga. 1990), *aff'd*, 953 F.2d 650 (11th Cir.), *cert. denied*, 506 U.S. 853 (1992).
 - 2. National Origin:** The Supreme Court has interpreted national origin as referring to "the country where a person was born, or, more broadly, the country from which his or her ancestors came." *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86, 88 (1973). The term does not include discrimination based solely on a person's citizenship. *Id.*; *Fortino v. Quasar Co.*, 950 F.2d 389, 392 (7th Cir. 1991).

The courts have generally upheld requirements that an employee be able to communicate in English, where the requirement is job-related. *See, e.g., Garcia v. Rush-Presbyterian-St. Luke's Medical Center*, 660 F.2d 1217, 1222 (7th Cir. 1981). The EEOC's position is that a rule requiring bi-lingual employees to only speak English at work is a "burdensome term and condition of employment" that presumably violates Title VII and should be closely scrutinized. 29 C.F.R. § 1606.7(a). Courts that have considered the issue, however, have generally upheld English-only rules. *See, e.g., Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993); *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981).

Discrimination based on national origin violates Title VII unless national origin is a bona fide occupational qualification (BFOQ) for the job in question. The employer must show that the discriminatory practice is "reasonably necessary to the normal operation of [the] particular business or enterprise." 42 U.S.C. § 2000e-2(e)(1). The courts and the EEOC interpret the BFOQ exception very narrowly. *See* 29 C.F.R. § 1604.2(a).

3. **Sex:** This provision prohibits discrimination based on gender, and applies to both men and women. Employer rules or policies that apply only to one gender violate Title VII. *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (rule prohibiting having children applied only to women). Employers also may not provide different benefits to women than to men. *City of Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702 (1978). Title VII also prohibits sexual harassment, as described more fully below.

In 1978, Congress amended Title VII to make it clear that the statute prohibited discrimination because of pregnancy. 42 U.S.C. § 2000e-(k). Employers may not consider an employee's pregnancy in making employment decisions. Employers must treat pregnancy-related disabilities in a similar fashion to other disabilities that similarly affect an employee's ability to work.

Discrimination based on sex violates Title VII unless sex is a bona fide occupational qualification (BFOQ) for the job in question.

4. **Religion:** The term "religion" includes "all aspects of religious observance and practice, as well as belief." 42 U.S.C. § 2000e-(j). The EEOC Guidelines state that protected religious practices "include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views." 29 C.F.R. § 1605.1. Sincerity of religious belief is an issue for the trier of fact. *E.E.O.C. v. Ilona of Hungary, Inc.*, 97 F.3d 204 (7th Cir. 1997). The statute imposes a duty to "reasonably accommodate to an employee's or prospective employee's religious observance or practice" unless doing so would impose an "undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e-(j).

Title VII exempts from coverage a "religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." 42 U.S.C. § 2000e-1(a). Religious discrimination is also not unlawful under Title VII where religion is a BFOQ for the job in question. 42 U.S.C. § 2000e-2(e)(1).

D. Theories of Discrimination

- 1. Disparate Treatment:** Title VII prohibits employers from treating applicants or employees differently because of their membership in a protected class. The central issue is whether the employer's actions were motivated by discriminatory intent, which may be proved by either direct or circumstantial evidence.

- a. Direct Method:** Under the direct method, a plaintiff attempts to establish that membership in the protected class was a motivating factor in the adverse job action. Plaintiff may offer direct evidence, such as that the defendant admitted that it was motivated by discriminatory intent or that it acted pursuant to a policy that is discriminatory on its face. In most cases, direct evidence of discrimination is not available, given that most employers do not openly admit that they discriminate. Facially discriminatory policies are only permissible if gender, national origin, or religion is a BFOQ for the position in question, as discussed above. Race or color may never be a BFOQ.

A plaintiff may also proceed under the direct method by offering any of the following three types of circumstantial evidence. The first type consists of "suspicious timing, ambiguous statements oral or written, behavior toward or comments directed at other employees in the protected group, and other bits and pieces from which an inference of discriminatory intent might be drawn." *Troupe v. May Department Stores*, 20 F.3d 734, 736 (7th Cir. 1994). The second type is evidence that other, similarly-situated employees not in the protected class received systematically better treatment. *Marshall v. American Hospital Assoc.*, 157 F.3d 520 (7th Cir. 1998). The third type is evidence that the plaintiff was qualified for the job, a person not in the protected class got the job, and the employer's stated reason for its decision is unworthy of belief. *Id.* This third type of circumstantial evidence is substantially the same as the evidence required by the *McDonnell Douglas* method described below.

- b. McDonnell Douglas Burden-Shifting Method:** In the majority of cases, the plaintiff lacks direct evidence of discrimination and must prove discriminatory intent indirectly by inference. The Supreme Court has created one structure for analyzing these types of cases, commonly known as the *McDonnell Douglas* burden-shifting formula, which it first articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and later refined in *Texas Department*

of *Community Affairs v. Burdine*, 450 U.S. 248 (1981), and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). The analysis is as follows: (1) the plaintiff must establish a prima facie case of discrimination; (2) the employer must then articulate, through admissible evidence, a legitimate, nondiscriminatory reason for its actions; and (3) in order to prevail, the plaintiff must prove that the employer's stated reason is a pretext to hide discrimination. *McDonnell Douglas*, 411 U. S. at 802-04; *Burdine*, 450 U.S. at 252-56. In the Seventh Circuit, courts generally analyze disparate treatment cases using this method, although attorneys may also use the direct method described above.

- (1) **Prima facie case:** The elements of the prima facie case are: (i) the plaintiff is a member of a protected class; (ii) the plaintiff applied and was qualified for the job; (iii) the application was rejected; and (iv) the position remained open after the rejection. *Hicks*, 509 U.S. at 505-507. In a termination case, the second element is whether the plaintiff was performing up to the employer's legitimate expectations. *Coco v. Elmwood Care, Inc.*, 128 F.3d 1177, 1178 (7th Cir. 1997). In, *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 631 (2000), the Supreme Court implied that this more demanding formulation may not be a correct application of *McDonnell Douglas*.

"The burden of establishing a prima facie case of disparate treatment is not onerous." *Burdine*, 450 U.S. at 253. Establishment of a prima facie case creates an inference that the employer acted with discriminatory intent. *Id.* at 254.

Although establishing a prima facie case used to be fairly routine, the courts have recently begun scrutinizing the second element of the test more rigorously. *See, e.g. Cengr v. Fusibond Piping Systems, Inc.*, 135 F.3d 445 (7th Cir. 1998); *Fisher v. Wayne Dalton Corp.*, 139 F.3d 1137 (7th Cir. 1998). It is the role of the judge, not the jury, to determine whether the plaintiff has stated a prima facie case. *Achor v. Riverside Golf Club*, 117 F.3d 339, 340 (7th Cir. 1997).

- (2) **Employer's burden of production:** In order to rebut the inference of discrimination, the employer must articulate, through admissible evidence, a legitimate, non-discriminatory reason for its actions. The employer's burden is one of

production, not persuasion; the ultimate burden of persuasion always remains with the plaintiff. *Hicks*, 509 U.S. at 511.

- (3) **Plaintiff's proof of pretext:** Proof that the defendant's asserted reason is untrue permits, but does not require, a finding of discrimination. *St. Mary's Honor Center v. Hicks*, 509 U.S. at 511; *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 1123 (7th Cir. 1994). The Seventh Circuit, in its most demanding formulation, requires a showing that the employer did not (or could not have) sincerely believe its proffered reason. *Stewart v. Henderson*, 207 F.3d 374 (7th Cir. 2000); *Massey v. Blue Cross-Blue Shield of Illinois*, 226 F.3d 922 (7th Cir. 2000) (discharge based on disproportionately harsh evaluations not pretextual absent evidence that the evaluations were not genuinely believed); *Kulumani v. Blue Cross Blue Shield Association*, 224 F.3d 681 (7th Cir. 2000) (pretext requires evidence of deceit). However, the plaintiff may offer evidence that the employer's belief was incorrect (i.e., it did not hire the most qualified candidate) as proof that the employer's belief was insincere. *Bell v. E.P.A.*, 232 F.3d 546 (7th Cir. 2000).

The Seventh Circuit has held in one case that where the defendant asserts several reasons for its decision, the plaintiff may not normally survive summary judgment by refuting only one of the reasons. *Coco v. Elmwood Care, Inc.*, 128 F.3d 1177, 1178 (7th Cir. 1997). In another case, the court held that plaintiff need not rebut all of defendant's reasons but must instead show that defendant's decision was based on a prohibited factor. *Monroe v. Children's Home Ass'n*, 128 F.3d 591, 593 (7th Cir. 1997).

In addition to producing evidence of the falsity of the employer's proffered reason, the plaintiff may also attempt to prove pretext using: (i) comparative evidence; (2) statistics; or (3) direct evidence of discrimination. *Pollard v. Rea Magnet Wire Co.*, 824 F.2d 557, 558 (7th Cir. 1987), *cert. denied*, 484 U.S. 977 (1987); BARBARA LINDEMANN AND PAUL GROSSMAN, 1 EMPLOYMENT DISCRIMINATION LAW 27 (3d ed. 1996).

- (i) **Comparative evidence:** Plaintiff may prove pretext by offering evidence that similarly situated employees who are not in the plaintiff's protected group were treated more favorably or did not receive the same adverse treatment. The Seventh Circuit has issued differing opinions on whether the plaintiff's testimony about the comparative employees is sufficient to raise a factual issue and survive summary judgment. For example, in *Collier v. Budd Co.*, 66 F.3d 886 (7th Cir. 1995), the employer offered evidence that the younger employees who were retained were better qualified than the plaintiff. In his deposition, the plaintiff disputed that these employees were better qualified. The court said that the resulting credibility decision was best left for the trier of fact, and reversed a summary judgment ruling for the employer. *Collier* at 893. On the other hand, in *Russell v. Acme-Evans Co.*, 51 F.3d 64 (7th Cir. 1995), the court held that the plaintiff's testimony regarding the qualifications of the workers who were given the positions that plaintiff wanted was insufficient to create a factual issue and survive summary judgment given that the employer had stated that they were more qualified. In any event, the Seventh Circuit has held that to be "similarly situated," the employees must be subject to the same decisionmaker. *Radue v. Kimberly Clark Corporation*, 219 F.3d 612 (7th Cir. 2000).
- (ii) **Statistics:** Statistics are admissible in individual disparate treatment cases, but their usefulness depends on their relevance to the specific decision affecting the individual plaintiff. LINDEMANN AND GROSSMAN, 1 EMPLOYMENT DISCRIMINATION LAW 34. The Seventh Circuit has approved the use of statistics as part of pretext evidence where it encompasses all employment decisions made by the employer in the relevant market. *Bell v. E.P.A.*, 232 F.3d 546 (7th Cir. 2000). Evidence that employer hires many workers within the protected class, while relevant, is not dispositive of nondiscrimination. *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 631 (2000).

(iii) **Direct evidence:** Although direct evidence of discrimination can be very powerful, courts often give little weight to discriminatory remarks made by persons other than decision makers, "stray" remarks not pertaining directly to the plaintiffs, or remarks that are distant in time to the disputed employment decision. *See, e.g., McCarthy v. Kemper Life Ins. Cos.*, 924 F.2d 683, 687 (7th Cir. 1991) (discriminatory remarks by a fellow employee are not evidence of discriminatory discharge because they were not made by a decision maker and the remarks occurred two years before the discharge); *Cowan v. Glenbrook Security Services, Inc.*, 123 F.3d 438, 444 (7th Cir. 1997) ("[S]tray remarks . . . cannot justify requiring the employer to prove that its hiring or firing or promotion decisions were based on legitimate criteria. Such remarks . . . when unrelated to the decisional issue process, are insufficient to demonstrate that the employer relied on illegitimate criteria, even when such statements are made by the decision maker"). The power of "stray remarks" was given some new life after the Supreme Court ruled in *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 631 (2000), that a lower court of appeals erred by discounting evidence of decision maker's age-related comments ("you must have come over on the Mayflower"), merely because not made "in the direct context of termination." Likewise, where a racially hostile co-worker can be shown to have had some influence on the decisionmaker, the co-worker's bias can be imputed to the employer. *Maarouf v. Walker Mfg Co.*, 210 F.3d 750 (7th Cir. 2000).

(4) **Sufficiency of Evidence.** In *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 631 (2000), the Supreme Court unanimously held that a plaintiff's prima facie case, combined with evidence sufficient to rebut employer's nondiscriminatory explanation for discharge, ordinarily meets plaintiff's burden of persuasion. Proof of pretext generally permits (but does not require) a fact finder to infer discrimination because showing an employer has falsely stated its reasons for discharge is probative of plaintiff's

claim.. However, in very limited circumstances, even proving pretext may not be sufficient sustain a finding of discrimination. (For example, defendant gives a false explanation to conceal something other than discrimination). In determining the sufficiency of evidence, a court must review “the record as a whole,” not just “evidence favorable” to plaintiff, and draw all reasonable inferences in favor of plaintiff. Same as the Rule 56 standard.

(5) Instructing the jury: If the case goes to a jury, the elaborate *McDonnell Douglas* formula should not be part of the jury instructions. See *Achor v. Riverside Golf Club*, 117 F.3d 339, 340 (7th Cir. 1997). The ultimate question for the jury is whether the defendant took the actions at issue because of the plaintiff's membership in a protected class. *Id.* at 341. The Seventh Circuit is not reluctant to reverse district court judges who grant employer's motions for judgment as a matter of law where there was sufficient evidence to get to the jury. *Mathur v. Bd. of Trustees*, 207 F.3d 938 (7th Cir. 2000).

c. Mixed Motives: The plaintiff in a disparate treatment case need only prove that membership in a protected class was a motivating factor in the employment decision, not that it was the sole factor. If the employer proves that it had another reason for its actions and it would have made the same decision without the discriminatory factor, it may avoid liability for monetary damages, reinstatement or promotion. The court may still grant the plaintiff declaratory relief, injunctive relief, and attorneys' fees and costs. 42 U.S.C. § 2000e-5(g)(2)(B)(i) (overruling in part *Price-Waterhouse v. Hopkins*, 490 U.S. 228 (1989)).

The Seventh Circuit recently held that in a mixed motives retaliation case, the plaintiff is not entitled to declaratory relief, injunctive relief, or attorneys fees because retaliation is not listed in the mixed motives provision of the 1991 Civil Rights Act. *McNutt v. Board of Trustees of the University of Illinois*, 141 F.3d 706, (7th Cir. 1998).

d. After-Acquired Evidence: If an employer takes an adverse employment action against an employee for a discriminatory reason and later discovers a legitimate reason which it can prove would have led it to take the same action, the employer is still liable for the discrimination, but the relief that the employee can recover may be limited. *McKennon v. Nashville Banner Publishing Co.*, 513 U.S.

352 (1995). In general, the employee is not entitled to reinstatement or front pay, and the back pay liability period is limited to the time between the occurrence of the discriminatory act and the date the misconduct justifying the job action is discovered. *McKennon*, 513 U.S. at 361-62.

- e. **Pattern or Practice Discrimination:** In class actions or other cases alleging a widespread practice of intentional discrimination, plaintiffs may establish a prima facie case using statistical evidence instead of comparative evidence pertaining to each class member. *Teamsters v. United States*, 431 U.S. 324 (1977). Plaintiffs often combine the statistical evidence with anecdotal or other evidence of discriminatory treatment. See, e.g., *Adams v. Ameritech Services, Inc.*, 231 F.3d 414 (7th Cir. 2000) (statistics eliminate innocent variables and anecdotal evidence supports discriminatory animus); *EEOC v. O & G Spring & Wire Forms Specialty Co.*, 38 F.3d 872, 874-75 (7th Cir. 1994) (plaintiff's statistical evidence was corroborated by anecdotal evidence and hiring records). The statistical evidence needs to control for potentially neutral explanations for the employment disparities. *Radue v. Kimberly Clark Corporation*, 219 F.3d 612 (7th Cir. 2000). The employer can rebut the prima facie case by introducing alternative statistics or by demonstrating that plaintiff's proof is either inaccurate or insignificant. *Teamsters*, 431 U.S. at 339-41. The plaintiff then bears the burden of proving that the employer's information is biased, inaccurate, or otherwise unworthy of credence. *Coates v. Johnson & Johnson*, 756 F.2d 524, 544 (7th Cir. 1985).

- 2. **Disparate Impact:** Even where an employer is not motivated by discriminatory intent, Title VII prohibits an the employer from using a facially neutral employment practice that has an unjustified adverse impact on members of a protected class.

- a. **Supreme Court Cases:** The Supreme Court first described the disparate impact theory in 1971, in *Griggs v. Duke Power Co.*, 401 U.S. 424, 431-2 (1971): Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. . . . [G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."

In 1989, the Supreme Court reduced the defendant's burden of proving business necessity to a burden of producing evidence of business justification. *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642, 657 (1989). The Civil Rights Act of 1991 overturned that portion of the *Wards Cove* decision.

b. Examples: Examples of practices that may be subject to a disparate impact challenge include written tests, height and weight requirements, educational requirements, and subjective procedures, such as interviews. The Seventh Circuit has recently held that the failure to provide female employees with a separate restroom facility at an outdoor job site, while not actionable sexual harassment, may be subject to a disparate impact challenge. *DeClue v. Central Illinois Light Co.*, 223 F.3d 434 (7th Cir. 2000).

c. Allocation of proof:

(1) Prima facie case: The plaintiff must prove, generally through statistical comparisons, that the challenged practice or selection device has a substantial adverse impact on a protected group. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i). The defendant can criticize the statistical analysis or offer different statistics.

(2) Business necessity: If the plaintiff establishes disparate impact, the employer must prove that the challenged practice is "job-related for the position in question and consistent with business necessity." 42 U.S.C. § 2000e-2(k)(1)(A)(i).

(3) Alternative practice with lesser impact: Even if the employer proves business necessity, the plaintiff may still prevail by showing that the employer has refused to adopt an alternative employment practice which would satisfy the employer's legitimate interests without having a disparate impact on a protected class. 42 U.S.C. § 2000e-2(k)(1)(A)(ii).

d. Selection Criteria

(1) Scored tests: There are several methods of measuring adverse impact. One method is the EEOC's Uniform Guidelines on Employee Selection Criteria, which finds an adverse impact if members of a protected class are selected at

a rates less than four fifths (80 percent) of that of another group. For example, if 50 percent of white applicants receive a passing score on a test, but only 30 percent of African-Americans pass, the relevant ratio would be 30/50, or 60 percent, which would violate the 80 percent rule. 29 C.F.R. §§ 1607.4 (D) and 1607.16 (R). The 80 percent rule is more of a rule of thumb for administrative convenience, and has been criticized by courts. 1 LINDEMANN AND GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, at 92-94. The courts more often find an adverse impact if the difference between the number of members of the protected class selected and the number that would be anticipated in a random selection system is more than two or three standard deviations. 1 LINDEMANN AND GROSSMAN, at 90-91. The defendant may then rebut the prima facie case by demonstrating that the scored test is job related and consistent with business necessity by showing that the test is "validated", although a formal validation study is not necessarily required. 29 CFR § 1607.5(B); *see Watson v. Fort Worth Bank & Trust Co.*, 487 U.S. 977, 998 (1988); *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975).

- (2) **Nonscored objective criteria:** The Uniform Guidelines are applicable to other measures of employee qualifications, such as educational, experience, and licensing requirements. In cases involving clerical or some blue collar work, the courts have generally found unlawful educational requirements that have a disparate impact. *See, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (invalidating high school diploma requirement for certain blue collar positions, where 34 percent of white males in state had completed high school while only 12 percent of African American males had done so, and defendant did not demonstrate link between high school diploma and job performance.) The higher the professional position or the greater the consequence of hiring unskilled applicants, the lower the burden upon the employer of proving job relatedness. *See, e.g., Briggs v. Anderson*, 796 F.2d 1009, 1023 (8th Cir. 1986) (college degree in psychology is a valid requirement for counselor position); *Aguilera v. Cook County Police & Corrections Merit Board*, 760 F.2d 844, 848 (7th Cir.), *cert. denied*, 474 U.S. 907 (1985) (high school diploma requirement for police officers and corrections officers is valid).

- (3) **Subjective criteria:** The use of subjective decision making is subject to challenge under a disparate impact theory, particularly when used to make employment decisions regarding blue collar jobs. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988).
 - e. **Perpetuation of past effects of discrimination.** Compensation systems which use facially neutral criteria but have the effect of perpetuating past (and time-barred) discriminatory effects are not necessarily discriminatory or illegal. *Ameritech Benefit Plan Committee v. Communication Workers of America*, 220 F.3d 814 (7th Cir. 2000).
- 3. **Harassment:** Although racial, religious, ethnic or sexual harassment are all forms of disparate treatment, a different legal analysis is used for harassment claims.
 - a. **Sexual Harassment:** There are two types of sexual harassment, quid pro quo and hostile environment. As discussed below, the Supreme Court has recently indicated that the use of these two categories is less important when the harasser is a supervisor. *See Farragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998); *Burlington Industries v. Ellerth*, 118 S. Ct. 2257 (1998).
 - (1) **Quid pro quo:** "Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, [or] (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual" EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a)(1) and (2). *See Bryson v. Chicago State University*, 96 F.3d 912, 915 (7th Cir. 1996) (quid pro quo harassment occurs where "submission to sexual demands is made a condition of tangible employment benefits").

- (2) **Hostile environment:** "Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when . . . (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a)(3). The courts generally require that the offensive behavior be fairly extreme in order to constitute a hostile environment. Factors that the courts consider include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris v. Forklift Systems*, 510 U.S. 17, 23 (1993). Even given these general guidelines, it is often difficult to predict whether a given set of facts will be sufficiently severe to be considered a hostile environment. *See, e.g. Saxton v. American Telephone & Telegraph Co.*, 10 F.3d 526, 533-35 (7th Cir. 1993) (co-worker on different occasions rubbing leg, kissing, and leaping out at plaintiff from behind a bush not sufficiently severe or pervasive); *Hennessy v. Penril Datacomm Networks, Inc.*, 69 F.3d 1344, 1353-54 (7th Cir. 1995) (co-worker taking victim to striptease bar, shouting for her to get up and perform, comparing her breasts to those of the dancers, and propositioning her would not have been enough for a claim).

The plaintiff is not required to prove psychological harm or tangible effects on job performance. *Harris v. Forklift Systems*, 510 U.S. 17 (1993). "Objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances." *Oncale v. Sundowner Offshore Services, Inc.*, 118 S. Ct. 998 (1998).

(3) **Employer liability**

- (i) **The Meritor Decision:** In *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 70-73 (1986), the Supreme Court held that an employer is not automatically liable for harassment by a supervisor in a hostile

environment case, and that courts should look to traditional agency principles to determine liability.

- (ii) **Harassment by a co-worker:** When the harasser is a co-worker, the employer is liable only if it was negligent, that is, only if it knew or should have known of the harassment and failed to take reasonable corrective action. *Mason v. Southern Illinois University*, 233 F.3d 1036 (7th Cir. 2000) (co-worker harassment needs to be pervasive); *McKenzie v. IDOT*, 92 F.3d 473, 480 (7th Cir. 1996); *Perry v. Harris Chernin, Inc.*, 126 F.3d 1010, 1013-4 (7th Cir. 1998) (where plaintiff did not complain to anyone about harassment and no one else complained on her behalf, her only chance at prevailing would be if the employer had reason to know of the harassment on its own).
- (iii) **Harassment by a supervisor:** The Supreme Court recently held that an employer is liable for actionable hostile environment sexual harassment by a supervisor with immediate (or higher) authority over the harassed employee. *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257 (1998); *Farragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998). If the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment, the employer is liable and has no affirmative defense. Even a negative evaluation or a denial of work supplies can constitute adverse action rendering the affirmative defense unavailable. *Molnar v. Booth*, 229 F.3d 593 (7th Cir. 2000).

When no tangible employment action is taken, the defending employer may raise an affirmative defense to liability or damages. The defense has two elements: "(a) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. While proof

that an employer had promulgated an anti-harassment policy with a complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense." *Farragher*, 118 S. Ct. at 2270; *see also Burlington Industries*, 118 S. Ct. at 2292-93.

- (iv) **Application of Principles.** The Seventh Circuit has held that a sexually hostile work environment may exist when an employee is subject to two attempted kisses, an attempted bra removal and a lewd comment. *Hostetler v. Quality Dining, Inc.* 218 F.3d 798 (7th Cir. 2000). An employer who transfers a harassment victim into a materially worse position has not provided an effective remedy and may be liable for damages arising from the undesirable transfer (even if the harassment has stopped). *Id.* A plaintiff's failure to complain about harassment for a full year can, in some circumstances, be reasonable. *Johnson v. West*, 218 F.3d 725 (7th Cir. 2000). An employer has taken adequate remedial measures where it conducts a prompt investigation into the harassment charges, reprimands the harasser, produces a letter of apology, and separates the victim from the harasser. *Tutman v. WBBM-TV, Inc./CBS, Inc.*, 209 F.3d 1044 (7th Cir. 2000).
- (v) **Same sex harassment:** An employer may be liable for harassment by a supervisor or co-worker who is the same gender as the target of the harassment, provided that the harassment was motivated by the plaintiff's gender. *Oncale v. Sundowner Offshore Services, Inc.*, 118 S.Ct. 998 (1998) (holding sex discrimination consisting of same-sex sexual

harassment is actionable under Title VII). However, harassment of worker because of her/his sexual orientation alone is not actionable. *Spearman v. Ford Motor Co.*, 231 F.3d 1080 (7th Cir. 2000); *Hamner v. St. Vincent Hospital and Health Care Center, Inc.* 224 F.3d 701 (7th Cir. 2000).

- b. **Racial or Ethnic Harassment:** Workers who are subjected to a higher level of criticism or who are subjected to racial or ethnic jokes, insults, graffiti, etc. may be able to establish a violation of Title VII. *See Rodgers v. Western-Southern Life Ins. Co.*, 12 F.3d 668 (7th Cir. 1993); *Snell v. Suffolk County*, 782 F.2d 1094 (2d Cir. 1986). Racial epithets not directed to plaintiff or which do not interfere with the work environment are not particularly probative of a racial harassment claim. *McPhaul v. Bd. of Commissioners*, 226 F.3d 558 (7th Cir. 2000). In general, the legal standards for racial harassment have been the same as those for a sex-based hostile environment claim, as detailed above. It is likely that those standards will change to reflect the change in law regarding sexual harassment by supervisors announced recently by the Supreme Court in *Farragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998), and *Burlington Industries v. Ellerth*, 118 S. Ct. 2257 (1998). *See Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581 (5th Cir. 1998 (applying vicarious liability principles announced in *Ellerth* to race discrimination termination case); *Wright-Simmons v. City of Oklahoma City*, 155 F.3d 1264 (10th Cir. 1998).
- c. **“Equal Opportunity” Harassment.** The Seventh Circuit has held that when an employer harasses both sexes truly equally, Title VII is not violated. *Holman v. Indiana*, 211 F.3d 399 (7th Cir. 2000).

4. Retaliation

- a. **Retaliation for "Participation":** Title VII prohibits discrimination against a current or former employee or an applicant "because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]." 42 U.S.C. § 2000e-3(a). The participation clause has been liberally construed, and it applies even if the employee is wrong on the merits of the original charge. *Berg v. LaCrosse Cooler Company*, 612 F.2d 1041, 1043 (7th Cir. 1980). *See also Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997) (the term "employees," as used in anti-retaliation

provision of Title VII, includes former employees). However, for the employee's expression or conduct to be protected from retaliation, it must make reference to a claim of "discrimination," and not merely lost benefits. *Miller v. American Family Mutual Ins. Co.*, 203 F.3d 997 (7th Cir. 2000).

- b. Retaliation for "Opposition":** Title VII also prohibits discrimination against a current or former employee or an applicant "because he has opposed any practice made an unlawful employment practice by [Title VII]." 42 U.S.C. § 2000e-3(a). The employee is protected if he or she had a reasonable and good faith belief that the practice opposed constituted a violation of Title VII, even if it turned out not to be a violation of Title VII. *Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1458 (7th Cir. 1994). Not all forms of opposition are protected, however, and action that unreasonably disrupts the work place may fall outside the statute's protection. *See Mozee v. Jeffboat, Inc.*, 746 F.2d 365, 374 (7th Cir. 1984) (court should balance disruption of plaintiff's absences from work to attend protests against the protest's advancement of Title VII's policy of eliminating discrimination).
- c. New EEOC Guidelines:** New EEOC guidelines state that retaliatory treatment can be challenged even if it is not an "ultimate employment action" or an action that "materially affects the terms or conditions of employment."
- d. Contemporaneous requirement.** The adverse employment action needs to be somewhat contemporaneous with the statutorily protected activity (such as the filing of a charge); otherwise an inference of discrimination will not be supported. *Paluck v. Gooding Rubber Co.*, 221 F.3d 1003 (7th Cir. 2000). As an example, an employer's decision to discharge a victim of harassment because the victim slapped the harasser could be viewed as retaliatory where the events are in close conjunction and the harasser was treated less harshly. *Johnson v. West*, 218 F.3d 725 (7th Cir. 2000).
- e. Retaliatory Hostile Work Environment.** An employer who creates or tolerates a hostile work environment (intimidating threats, etc.) against a worker who has filed a charge of discrimination may be liable for retaliation. *Heuer v. Weil-McLain*, 203 F.3d 1021 (7th Cir. 2000).

5. **Other Adverse Action.** Besides discharge, demotion, lack of promotion, harassment and retaliation, other “adverse” conditions of employment can be actionable forms of discrimination, such as a less distinguished title, loss of benefits, diminished job responsibilities and even arbitrary drug testing. *Stockett v. Muncie Indiana Transit System*, 221 F.3d 997 (7th Cir. 2000) See also *Hunt v. City of Markham*, 219 F.3d 649 (7th Cir. 2000) (denial of raise and denial of temporary promotion are “adverse employment actions” but denial of a bonus usually is not); *Place v. Abbott Laboratories*, 215 F.3d 803 (7th Cir. 2000) (requiring a medical exam upon return from leave is an adverse work condition, but a transfer to a substantially equivalent position, even if lacking supervisory responsibilities, is not); *Malacara v. Madison*, 224 F.3d 727 (7th Cir. 2000) (failure to train an employee can be actionable); *McPhaul v. Bd. of Commissioners*, 226 F.3d 558 (7th Cir. 2000) (imposition of dress code not an adverse employment action).

A constructive discharge may also be actionable, although courts require fairly intolerable conditions before crediting an employee with a constructive discharge. *EEOC v. Sears, Roebuck & Co.*, 233 F.3d 432 (7th Cir. 2000) (constructive discharge exists where quitting is the only reasonable option). *Tutman v. WBBM-TV, Inc./CBS, Inc.*, 209 F.3d 1044 (7th Cir. 2000) (credible death threat from a co-worker justifies constructive discharge). *Hunt v. City of Markham*, 219 F.3d 649 (7th Cir. 2000) (being told that you have “no future” with the employer creates a constructive discharge). By contrast, an employer who deliberately overrates an employee (to avoid future EEO charges) has not taken an adverse employment action, especially if the employee has been given informal, honest feedback of her performance. *Cullom v. Brown*, 209 F.3d 1035 (7th Cir. 2000).

II. THE CIVIL RIGHTS ACT OF 1866, 42 U.S.C. § 1981

- A. **Statutory Language:** Section 1981 states that "all persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens . . ."
- B. **Scope**
1. Section 1981 prohibits only "racial" discrimination, although "race" is defined quite broadly to mean identifiable classes of persons based on their ancestry or ethnic characteristics. Section 1981 applies to discrimination against groups such as blacks, Latinos, Jews, Iraqis, Arabs, and whites. *St. Francis College v. Al-Khazraji*, 481 U.S. 604 (1987); *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987).

2. Section 1981 applies to all employers even if they do not have 15 employees.
3. The term "make and enforce contracts" in § 1981 "includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b) (added by the Civil Rights Act of 1991 to overrule *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), which held that § 1981 applied only to hiring and promotions that create a new and distinct relation between the employer and employee).
4. Recently, the Seventh Circuit, in dicta, indicated that plaintiff's employment at will situation would probably not suffice as a contract under a § 1981 claim. The court did not have to decide that issue, however, because plaintiff had no evidence of discrimination and her claim failed on that ground alone. *Gonzalez v. Ingersoll Milling Machine*, 133 F.3d 1025, 1034 (7th Cir. 1998).

C. Differences from Title VII:

1. Section 1981 applies to all employers regardless of size, unlike Title VII's restriction to employers with 15 or more employees.
2. Section 1981 claims are filed directly in federal court, not with the EEOC or any other agency.
3. Section 1981 does not prohibit practices that have a disparate impact; it only applies to disparate treatment caused by intentional discrimination. *General Building Contractors Association v. Pennsylvania*, 458 U.S. 375 (1982).
4. A successful plaintiff may receive unlimited compensatory and punitive damages; there are no caps on damages as there are under Title VII.
5. The statute of limitations for § 1981 is borrowed from the state statute of limitations for personal injury actions, and in Illinois, is two years. *Smith v. City of Chicago Heights*, 951 F.2d 834, 839 (7th Cir. 1992); 735 I.L.C.S. 5/13/202.

III. EEOC PROCEEDINGS

- A. Scope of these materials:** This manual is intended for use by attorneys appointed to represent plaintiffs in employment discrimination cases in the Northern District of Illinois. At the time of such appointment, proceedings before the EEOC have

terminated. Therefore an extensive discussion of EEOC proceedings is beyond the scope of this manual.

B. Summary of Proceedings

1. **Title VII Prerequisite:** Title VII claims may not be brought in federal court until after they have been filed in writing with the EEOC, and the EEOC has issued a right-to-sue letter. 42 U.S.C. § 2000e-5(f)(1); *Vela v. Sauk Village*, 218 F.3d 661 (7th Cir. 2000).
2. **Time requirements for charges:** In general a charge must be filed with the EEOC within 180 days from when the discrimination occurs, except in states like Illinois, where the Illinois Department of Human Rights also has the power to investigate claims of discrimination. In Illinois, a charging party has 300 days from the date of the alleged discrimination to file a charge with the EEOC if the IDHR also has jurisdiction over the claim. *Marlowe v. Bottarelli*, 938 F.2d 807, 813 (7th Cir. 1991); *Sofferin v. American Airlines, Inc.*, 923 F.2d 552, 553 (7th Cir. 1991). This filing requirement is not a jurisdictional prerequisite, and is subject to laches, estoppel, and equitable tolling. *Zipes v. Trans World Airline, Inc.*, 455 U.S. 385, 393 (1982).

The limitations period starts to run when the discriminatory act occurs, not when the last discriminatory effects are felt. *Delaware State College v. Ricks*, 449 U.S. 250 (1980). Under the equitable tolling doctrine, if the plaintiff did not have reason to know that a series of acts were discriminatory, he can bring charges on all the acts after the 300 day limit if he brings the charges promptly after he knows or with the exercise of reasonable diligence would have known of their discriminatory nature. *Moskowitz v. Trustees of Purdue University*, 5 F.3d 279, 281-82 (7th Cir. 1993).

Plaintiff may also try to allege a continuing violation, linking a series of discriminatory acts with at least one occurring within the charge-filing period. *See id.* at 282. The continuing violations doctrine has taken many different formulations. Most recently, the Seventh Circuit has held that the doctrine applies when (1) it is difficult to pinpoint the exact date of a violation; (2) the attacked policy is openly and continuously espoused; or (3) the conduct is so covert and subtle it takes additional time to recognize it. *Place v. Abbott Laboratories*, 215 F.3d 803 (7th Cir. 2000). In *Moskowitz v. Trustees of Purdue University*, 5 F.3d 279, 281-82 (7th Cir. 1993), however, the court labelled the continuing violation theory is a "rather vague concept" that is "of questionable utility when applied to a statute of limitations subject to equitable tolling." *Id.* at 281.

3. **Investigation:** The EEOC's investigation may include gathering information regarding the respondent's position, interviewing witnesses, and reviewing key documents. The EEOC has the power to issue subpoenas in connection with an investigation. 42 U.S.C. § 2000e-9.
4. **Determination:** At the conclusion of the investigation, the EEOC issues a letter of determination as to whether "there is reasonable cause to believe that the charge is true." 42 U.S.C. § 2000e-5(b). Although trial in the district court is de novo, the EEOC's investigative determination is admissible in Title VII actions. *LaDolce v. Bank Administration Institute*, 585 F. Supp. 975, 977 (N.D. Ill. 1984); *Czarnowski v. DeSoto, Inc.*, 518 F. Supp. 1252, 1257 (N.D. Ill. 1981). If there is a reasonable cause finding, the EEOC must attempt to conciliate the claim. 28 C.F.R. § 42.609(a).
5. **Dismissal and Issuance of Right-to-Sue Letter:** The EEOC will issue a right-to-sue letter even if it finds there is no reasonable cause to believe that the charge is true. The EEOC may dismiss a charge and issue a right-to-sue letter in any of the following situations:
 - a. the EEOC determines it does not have jurisdiction over the charge, 29 C.F.R. § 1601.18(a);
 - b. the EEOC closes the file where the charging party does not cooperate or cannot be located, 29 C.F.R. § 1601.18(b), (c);
 - c. the charging party requests a right-to-sue letter before the EEOC completes its investigation (if less than 180 days after filing of charge, EEOC must determine that the investigation cannot be completed within 180 days);
 - d. the EEOC determines there is no reasonable cause, 29 C.F.R. 1601.19(a); or
 - e. the EEOC has found reasonable cause, conciliation has failed, and the EEOC (or the Department of Justice for governmental respondents) has decided not to litigate.
6. **State and local government employees:** While the EEOC investigates charges involving employees of state and local governments, it is the Justice Department, not the EEOC, that has the authority to litigate these cases. 42 U.S.C. § 2000e-5(f)(1). If the Justice Department declines to litigate the case, the EEOC issues a right to sue to the charging party.

7. **Federal employees:** Federal employees do not file original charges directly with the EEOC; they first go through an internal process. The regulations describing this process and related appeals are at 29 C.F.R. §§ 1614.105 and 1614.408.

IV. THE COMPLAINT

- A. **Proper Defendants for a Title VII Action:** As a general rule, a party not named in an EEOC charge cannot be sued under Title VII. This requirement is, however, subject to waiver, estoppel and equitable tolling. *Simpson v. Borg-Warner Automotive*, 1997 WL 769358 *1 (N.D.Ill. 1997).
 1. **Employers:** Title VII applies to employers. "The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar years, and any agent of such a person." 42 U.S.C. 2000e(b).
 2. **Labor organizations and employment agencies:** These entities are also covered by Title VII. 42 U.S.C. 2000e-2.
 3. **Supervisors:** A supervisor, in his or her individual capacity, does not fall within Title VII's definition of an employer. *Williams v. Banning*, 72 F.3d 552, 555 (7th Cir. 1995).
- B. **Scope of the Title VII Suit:** A plaintiff may pursue a claim not explicitly included in an EEOC charge only if the claim falls within the scope of the charges contained in the EEOC charge. In determining whether the current allegations fall within the scope of the earlier charges, the court looks at whether they are like or reasonably related to those contained in the EEOC charge. If they are, the court then asks whether the current claim reasonably could have developed from the EEOC's investigation of the charges before it. *Cheek v. Peabody Coal Co.*, 97 F.3d 200, 202 (7th Cir. 1996).
- C. **Timeliness in a Title VII Suit:** Complaint must be instituted within ninety days of the "receipt" of the right-to-sue letter. 42 U.S.C. § 2000e-5(f)(1).
 1. The ninety day limit begins to run on the date the notice was delivered to the most recent address plaintiff provided the EEOC. *St. Louis v. Alverno College*, 744 F.2d 1314, 1316 (7th Cir. 1984). The court considers "actual knowledge" when determining whether the time period in which a suit can be filed has commenced. If an attorney receives the right-to-sue letter for his

client, this receipt suffices for actual knowledge. *Jones v. Madison Service Corp.*, 744 F.2d 1309, 1313 (7th Cir. 1984).

2. Compliance with the 90 day time limit is not a jurisdictional prerequisite. It is a condition precedent to filing suit and is subject to equitable modification. *Simmons v. Illinois Dept. of Mental Health and Developmental Disabilities*, 74 F.3d 1242 (7th Cir. 1996). Equitable tolling applies only in situations in which the claimant has made a good faith error (brought suit in the wrong court) or has been prevented in some extraordinary way from filing the complaint in time. *Jones v. Madison Service Corp.*, 744 F.2d 1309, 1314 (7th Cir. 1984).

D. Timeliness in a § 1981 Suit: Courts apply the state personal injury statute of limitations in § 1981 cases. In Illinois, § 1981 cases are governed by the two-year statute of limitations for personal injury actions. *Smith v. City of Chicago Heights*, 951 F.2d 834, 839 (7th Cir. 1992); 735 I.L.C.S. 5/13/202. Filing a complaint with the EEOC does *not* toll the running of the state statute of limitations on a § 1981 claim.

E. Right to a Jury Trial: When legal and equitable claims are presented, both parties have a right to a jury trial on the legal claims. The right remains intact and cannot be dismissed as "incidental" to the equitable relief sought. *Curtis v. Loether*, 415 U.S. 189, 196 (1974). If the plaintiff seeks compensatory and punitive damages, any party may demand a jury trial. 42 U.S.C. § 1981a(c).

V. Remedies

A. Equitable Remedies for Disparate Treatment: If the court finds that the defendant has intentionally engaged in or is intentionally engaging in an unlawful employment practice, the court may enjoin the defendant from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, including, but not limited to, reinstatement or hiring of employees, with or without back pay, or any other equitable relief the court deems appropriate. 42 U.S.C. § 2000e-5(g)(1).

1. Back pay may be awarded as far back as two years prior to the filing of a charge with the EEOC. 42 U.S.C. § 2000e-5(g)(1).
2. A back pay award will be reduced by the amount of interim earnings or the amount earnable with reasonable diligence. 42 U.S.C. § 2000e-5(g)(1). It is defendant's burden to prove lack of reasonable diligence. *Gaddy v. Abex Corp.*, 884 F.2d 312, 318 (7th Cir. 1989).

3. Back pay and/or reinstatement/order to hire will only be granted if the court determines that but for the discrimination, the plaintiff would have gotten the promotion/job or would not have been suspended or discharged. 42 U.S.C. § 2000e-5(g)(2)(A).
4. In a mixed motive case, the court may not award damages or issue an order requiring any admission, reinstatement, hiring, promotion or payment, but may grant declaratory relief, injunctive relief (as long as it is not in conflict with the prohibited remedies) and attorney's fees and costs. 42 U.S.C. § 2000e-5(g)(2)(B)(i).
5. A district court can order demotion of somebody whose promotion was the product of discrimination. *Adams v. City of Chicago*, 135 F.3d 1155 (7th Cir. 1998).

B. Compensatory and Punitive Damages: Compensatory and punitive damages are available in disparate treatment cases, but not in disparate impact cases. 42 U.S.C. § 1981a.

1. Compensatory damages may be awarded for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses. 42 U.S.C. 1981a(b).
2. Punitive damages may be awarded when the defendant is found to have engaged in discriminatory practices with malice or with reckless indifference. 42 U.S.C. § 1981a(b)(1). *See, e.g., Gile v. United Airlines, Inc.* 213 F.3d 365 (7th Cir. 2000); *Slane v. Mariah Boats, Inc.*, 164 F.3d 1065 (7th Cir. 1999). The question of whether an employer has acted with malice or reckless indifference ultimately focuses on the actor's state of mind, not the actor's conduct. An employer's conduct need not be independently “egregious” to satisfy § 1981(a)'s requirements for a punitive damages award, although evidence of egregious behavior may provide a valuable means by which an employee can show the “malice” or “reckless indifference” needed to qualify for such an award. *See Kolstad v. American Dental Association*, 119 S.Ct. 2118 (1999).

The employer's “malice” or “reckless indifference” necessary to impose punitive damages pertain to the employer's knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination. *See id.* An employer is not vicariously

liable for discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's good faith efforts to comply with Title VII. *See id.* Punitive damages may be awarded even when back pay and compensatory damages are not. *Timm v. Progressive Steel Treating, Inc.*, 137 F.3d 1008 (7th Cir. 1998).

In determining the appropriateness of punitive damages, a court may examine the length of time the employer was on notice of its own unlawful conduct (as in the case of liability for harassment). *EEOC v. Indiana Bell Telephone Co., Inc.* 214 F.3d 813 (7th Cir. 2000). On the other hand, to oppose punitive damages, the employer is entitled to present to the fact-finder the terms of an applicable collective bargaining agreement that may explain its failure to rectify unlawful conduct. *Id.* Punitive damages are not available against state, local, or federal governmental employees. 42 U.S.C. § 1981a(b)(1).

3. Compensatory and punitive damages are subject to caps in Title VII cases. The sum amount of compensatory and punitive damages awarded for each complaining party shall not exceed, (A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$50,000; (B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$100,000; (C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$200,000; and (D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, \$300,000. 42 U.S.C. § 1981a(b)(3). Backpay and front pay do not count toward these caps. *Pals v. Schepel Buick & GMC Truck, Inc.*, 220 F.3d 495 (7th Cir. 2000)

There are no caps on compensatory or punitive damages in § 1981 cases. 42 U.S.C. § 1981(b)(4).

4. The court shall not inform the jury of the cap on damages. 42 U.S.C. 1981a(c).

C. Front Pay and Lost Future Earnings: Both front pay and lost future earnings awards are Title VII remedies. Front pay is an equitable remedy and is a substitute

for reinstatement when reinstatement is not possible. An award of lost future earnings compensates the victim for intangible nonpecuniary loss (an injury to professional standing or an injury to character and reputation). An award of lost future earnings is a common-law tort remedy and a plaintiff must show that his injuries have caused a diminution in his ability to earn a living. The two awards compensate the plaintiff for different injuries and are not duplicative. *Williams v. Pharmacia*, 137 F.3d 944 (7th Cir. 1998).

D. Attorney's Fees: In Title VII cases, the court, in its discretion, may allow a prevailing party, other than the EEOC or the United States, a reasonable attorney's fee and reasonable expert witness fees. 42 U.S.C. § 2000e-5(k). In § 1981 cases, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and may include expert fees as part of the attorney's fee. 42 U.S.C. § 1988(b-c).

1. Although the language of the statute does not distinguish between prevailing plaintiffs and prevailing defendants, in a Title VII case, attorney's fees are only awarded to prevailing defendants upon a finding that the plaintiff's action was "frivolous, unreasonable or groundless" or that the plaintiff continued to litigate after it clearly became so. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978).
2. Although the language of the statute does not distinguish between prevailing plaintiffs and prevailing defendants, in a § 1981 case, the prevailing defendant is only entitled to attorney's fees if the court finds that the plaintiff's action was "vexatious, frivolous, or brought to harass or embarrass the defendant." *Hensley v. Eckerhart*, 461 U.S. 424, 429, n.2 (1983).
3. "A plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Cady v. City of Chicago*, 43 F.3d 326, 328 (7th Cir. 1994).
4. A rule of thumb is that a plaintiff should recover at least 10% of the plaintiff's claimed damages to obtain an award of attorneys' fees. *Tuf Racing Products, Inc. v. American Suzuki Motor Corp.*, 223 F.3d 585 (7th Cir. 2000).

VI. Arbitration

- A. **The Gilmer Decision:** In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), the Supreme Court held that an Age Discrimination in Employment Act claim could be subject to compulsory arbitration. This Supreme Court did not decide in *Gilmer* whether this rule applied generally to all employment relationships. However, the Court held that the employee retains the right to file a charge with the EEOC and obtain a federal government investigation of the charge. *Id.* at 28.
- B. **The Circuit City Decision.** In *Circuit City Stores, Inc. v. Adams*, 121 S.Ct. 1302 (2001), the Supreme Court resolved the question unanswered in *Gilmer* and held that any employment agreement containing an agreement to arbitrate an employment discrimination claim is subject to compulsory arbitration. The Seventh Circuit had previously held that Title VII claims are also subject to compulsory arbitration. *See, e.g., Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126 (7th Cir. 1997); *Kresock v. Bankers Trust Co.*, 21 F.3d 176 (7th Cir. 1994). The court treats agreements to arbitrate like any other contract. *Gibson*, 121 F.3d at 1130. For example, in *Gibson*, the court held that the arbitration agreement was unenforceable because the employer did not give the employee any consideration for her agreement to arbitrate. *Id.* at 1131. Possible consideration could have been an agreement by the employer to arbitrate all claims or a promise that it would continue employing plaintiff if she agreed to arbitrate all claims. *Id.* at 1131-32.
- C. **Collective Bargaining Agreements:** In the Seventh Circuit, collective bargaining agreements cannot compel arbitration of statutory rights. *Pryner v. Tractor Supply Co.*, 109 F.3d 354 (7th Cir. 1997).